APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 606—September Term, 1972.

(Argued March 22, 1973 Decided May 1, 1973.)

Docket No. 72-1744

JANE DOE; JOHN DOE; RICHARD ROE; JAMES POE; JAMES DOE; JAMES ROE; JOHN ROE; RICHARD DOE; JANE ROE, nine migrant agricultural workers, on behalf of each and on behalf of all others similarly situated; namely those persons engaged in migrant agricultural labor in Ulster County, New York,

Plaintiffs-Appellants,

—against—

JAMES D. HODGSON, Secretary of Labor; JOHN E. WALTERS, Commissioner of Internal Revenue; LOUIS LEVINE, Industrial Commissioner of the State of New York; EDWARD B. MILLER, Chairman, National Labor Relations Board; HORACE MENASCO, Administrator, Wage and Hour Division, United States Department of Labor; GEORGE OSTROW, Director, Division of Labor Standards, New York State Department of Labor; ROBERT M. BALL, Commissioner of Social Security; SOLOMON SENIOR, Chairman, New York State Workmen's Compensation Board,

Defendants-Appellees.

Before:

SMITH, FEINBERG and MANSFIELD,
Circuit Judges.

Appeal from order of United States District Court for the Southern District of New York, Marvin E. Frankel, *J.*, dismissing complaint for want of substantial federal question.

Affirmed.

BURT NEUBORNE, New York, N.Y. (New York Civil Liberties Union; Norman Dorsen, New York University Law School, on the brief), *for Plaintiffs-Appellants.*

T. GORMAN REILLY, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; Taggart D. Adams, Assistant United States Attorney, on the brief), *for federal Defendants-Appellees.*

STEPHEN P. SELIGMAN, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York; Samuel A. Hirshowitz, First Assistant Attorney General; Irving L. Rollings, Assistant Attorney General, on the brief), *for New York State Defendants-Appellees.*

FEINBERG, *Circuit Judge:*

Nine migrant agricultural workers, protected by pseudonyms, challenge the constitutionality of provisions in

various federal and state statutes which operate to exclude them and others so situated from the beneficial provisions of social legislation in such areas as unemployment compensation, minimum hours and wages, social security and workmen's compensation.[1] Plaintiffs' complaint sought the convening of a three-judge court, a declaratory judgment, and "appropriate equitable relief in the nature of injunction or mandamus enforcing plaintiffs' rights and defendants' responsibilities under the First, Fifth, Thirteenth and Fourteenth Amendments. . . . " The United States District Court for the Southern District of New York, Marvin E. Frankel, *J.*, refused to convene a three-judge court and dismissed the complaint, 344 F. Supp. 964 (1972), because of the controlling effect of *Romero* v. *Hodgson,* 403 U.S. 901 (1971), summarily affirming 319 F. Supp. 1201 (N.D. Cal. 1970) (per curiam). Although we believe that as an original matter plaintiffs' basic equal protection claim merits the closest judicial attention, we conclude that under applicable precedent we should not now engage in that pursuit. Because the plight of migrant workers as portrayed in plaintiffs' complaint is so unfortunate,[2] we reach

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[1] The complaint challenges the Federal Unemployment Tax Act, 26 U.S.C. § 3306(e)(1), (k); the Fair Labor Standards Act, 29 U.S.C. § 206(a)(5); the Social Security Act, 42 U.S.C. § 409 (h)(2); the New York Unemployment Insurance Act, N.Y. Labor Law § 511(6)(a) (McKinney 1965); the New York Minimum Wage Act, id. § 651(5)(b), id. §§ 671(6), 673 (1972-73 Supp.); and the New York Workmen's Compensation Law, N.Y. Wkmn's Comp. Law § 201(6)(A) (McKinney 1965). Plaintiffs also attack exclusion from and misapplication of the National Labor Relations Act, 29 U.S.C. §§ 152(3), 158(b)(4).

In their briefs in this court, plaintiffs refer to only one state statute, the workmen's compensation law. In view of our disposition, we think it unnecessary to resolve any inconsistency.

[2] E.g., none of the plaintiffs earns more than $3,000 per year; they are randomly subject to enforced periods of unemployment ranging up to weeks without any compensation, during which they

this conclusion, and consequently affirm, with considerable hesitation.[3]

In *Romero* v. *Hodgson, supra,* a divided three-judge court sustained the Federal Unemployment Tax Act, one of the statutes under attack here, against an equal protection challenge. Faced with the argument that the exclusion of agricultural labor from the coverage of the statute was no longer justifiable on the grounds originally relied upon by the Supreme Court in 1937,[4] the majority nevertheless sustained the exclusion, 319 F. Supp. at 1203, because it could

> be seen as an indirect subsidy of a "beneficent enterprise", or as an effort to save the compensation fund from the drain which would result from the inclusion of another large "deficit industry", or even as a necessary political compromise without which it would have been impossible to inaugurate a most important reform in American institutions.

Judge Zirpoli filed a strong dissent, arguing that the exclusion was now factually unsupportable and therefore ir-

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are "reduced to utter destitution"; although subjected to serious occupational hazards posed by mechanized equipment and noxious pesticides, plaintiffs are without the disability protections of workmen's compensation laws.

[3] Because we agree with Judge Frankel's resolution, we need not consider alternative objections to relief, pressed by appellees and alluded to by the district court, i.e., whether plaintiffs' prayer for injunctive relief is sufficiently concrete to merit three-judge consideration, and whether plaintiffs seek to enjoin assessment or collection of federal taxes, as prohibited by 26 U.S.C. § 7421(a). See 344 F. Supp. 967 & n. 3.

[4] *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 512-13 (1937).

rational. The dissent pointed out that while administrative hardship for small farmers might have justified the original exemption of agricultural workers, "in 1964, 89 per cent of all hired farm workers . . . were employed by large commercial agricultural corporations"; in addition, unemployment compensation has been extended to other industries which "fiscally speaking, are much greater drains on the compensation fund," thus making "untenable the . . . argument that agriculture has been excluded as a 'deficit' industry" (footnote omitted); and, finally, the "Unemployment Tax Act is not an industrial subsidy; it is social welfare legislation." Id. at 1205. With the issues thus clearly spelled out, on direct appeal to the Supreme Court the judgement of the district court was summarily affirmed.[5]

Plaintiffs argue that such a disposition should not be controlling in this case. They point to the heavy Supreme Court caseload and the observations of Supreme Court scholars (including the recent report of a study group chaired by Professor Paul A. Freund) to the effect that summary disposition of cases on the appellate docket "is not a satisfactory equivilent for the judgment on the merits it is supposed to be."[6] Plaintiffs thus contend that summary affirmance is entitled to no more—or little more—precedential weight than is the denial of a petition for a writ of certiorari. However, we have ruled to the contrary. See *United States ex rel. Epton* v. *Nenna*, 446 F.2d 363, 366, cert. denied, 404 U.S. 948 (1971); *Heaney*

[5] Mr. Justice Douglas would have noted probable jurisdiction.

[6] Report of the Study Group on the Caseload of the Supreme Court 26 (1972); see authorities cited in *United States ex rel. Epton* v. *Nenna*, 318 F. Supp. 899, 906 n.8 (S.D.N.Y. 1970).

v. *Allen*, 425 F.2d 869, 870-71 (1970); *Port Authority Bondholders Protective Committee* v. *Port of New York Authority*, 387 F.2d 259, 262-63 n.3 (1967).[7] We are aware that the Ninth Circuit has stated that a summary affirmance by the Supreme Court of a case within its "obligatory appellate jurisdiction has very little precedential significance." See *Dillenburg* v. *Kramer*, 469 F.2d 1222, 1225 (1972).[8] For now, however, we continue to believe that we are bound by the Supreme Court's summary affirmances "until such time as the Court informs us that we are not." *United States ex rel. Fein* v. *Deegan*, 410 F.2d 13, 22 (2d Cir.), cert. denied, 395 U.S. 935 (1969).

Plaintiffs also argue that even if the affirmance in *Romero* is entitled to precedential weight, differences between that case and this are so significant that the affirmance in the former cannot foreclose the claims made here. *Romero*, they say, challenged only one statute, while this case attacks many in an effort to establish a "pattern or practice" of systematic exclusion of migrants from curative social legislation. Second, plaintiffs contend that they can here demonstrate a "causal relationship" between the exclusions and deprivation of fundamental rights, e.g., association, speech, right to travel, and that strict equal protection review is thus appropriate. Finally, plaintiffs urge that *Romero* was decided prior to cases from the last Term in

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[7] Although these cases considered the stare decisis effect of a Supreme Court *dismissal*, for want of a substantial federal question, of an appeal from a state court, their reasoning applies with at least as much force to summary affirmances on direct appeals from three-judge courts. This difference in disposition is without significance, explained only by history. R. Stern & E. Gressman, Supreme Court Practice 233 (4th ed. 1969).

[8] Accord, *Serrano* v. *Priest*, 487 P.2d 1241, 1264 & n.35 (1971) (dictum).

which the Supreme Court invested "rational basis" review under the equal protection clause with considerably more bite and realistic application than had previously been thought appropriate.

These arguments, particularly the last, are by no means frivolous. However, as to the first two, we cannot in good conscience hold that either the presence of four federal statutes under attack instead of one or the bare assertion that "fundamental rights" of migrants are jeopardized by the statutory exclusions justifies our disregarding *Romero*. As to the last argument, we have ourselves noted the apparent, post-*Romero*, trend toward a less deferential application of the "rational basis" standard of equal protection,[9] although not without some disagreement. See *Boraas* v. *Village of Belle Terre*, slip op. 2697 (2d Cir. April 5, 1973) (Timbers, J., dissenting from 4-4 denial of en banc reconsideration). Were we writing on a clean slate, we would take very seriously the assertion that on these facts the statutory exclusions cannot be sustained. But given *Romero*, the slate is not clean; plaintiffs must obtain any further writings on it in this case from the Supreme Court.

Judgment affirmed.

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[9] In particular, while the three-judge district court *Romero* majority noted "something rigid" about the choice between the strict standard of review and one "as deferential as any known to the law," 319 F. Supp. at 1202, it is precisely this sharp dichotomy which we have found considerably narrowed. See, e.g., *Boraas* v. *Village of Belle Terre*, slip op. 1995, 2008-09 (2d Cir. Feb. 27, 1973); *Green* v. *Waterford Board of Education*, 473 F.2d 629, 633-34 (2d Cir. 1973); *City of New York* v. *Richardson*, slip op. 1681, 1694-95 (2d Cir. Jan. 26, 1973); *Aguayo* v. *Richardson*, slip op. 1555, 1587-90 (2d Cir. Jan. 18, 1973).

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 1816

JANE DOE, *et al.*,

Plaintiffs,

—against—

JAMES D. HODGSON, Secretary of Labor, *et al.*,

Defendants.

Appearances:

BURT NEUBORNE, Esq.
NORMAN DORSEN, Esq.
New York Civil Liberties Union
New York, N.Y.
Attorneys for Plaintiffs

HON. WHITNEY NORTH SEYMOUR, JR.
United States Attorney for the Southern District of New York
Attorney for Federal Defendants

T. GORMAN REILLY, Esq.
Of Counsel

HON. LOUIS J. LEFKOWITZ
Attorney General for the State of New York
Attorney for New York State Defendants

IRVING L. ROLLINS, Esq.
Of Counsel

FRANKEL, *D.J.*

The nine plaintiffs are agricultural laborers. Using fictitious names, they have brought the somewhat unusual form of action which is now before the court on their motion for the convening of a three-judge court. The "omnibus complaint," as the United States Attorney suitably styles it, names as defendants five federal officials—the Secretary of Labor, the Commissioner of Internal Revenue, the Chairman of the N.L.R.B., the Administrator of the Labor Department's Wage and Hour Division and the Commissioner of Social Security—and three New York State officials—the Industrial Commissioner, the Director of the Division of Labor Standards, New York State Department of Labor, and the Chairman of the Workmen's Compensation Board. The impersonal complaint against these defendants is that the statutes they administer contain exclusions withholding benefits and protections from agricultural workers. The array of statutes thus assailed are the Federal Unemployment Tax Act, 26 U.S.C. §3306 (c)(1)(K), the Fair Labor Standards Act, 29 U.S.C. §206(a)(5), the Social Security Act, 42 U.S.C. §409(h)(2), the New York Unemployment Insurance Act (Labor Law §511(6)(a)), the New York Minimum Wage Act (*id.* §§651(5)(b), 671(6) and 673), and the New York Workmen's Compensation Law, §201(6)(A). Plaintiffs also protest "the threatened mis-application of the National Labor Relations Act (29 U.S.C. §158(b)(4)) * * *." Invoking the jurisdiction of this court under 28 U.S.C. §§1331, 1343(3) and 1361, together with 5 U.S.C. §1009, they charge that the target statutes, individually and in their "cumulative effect," offend against the First, Fifth, Thirteenth and Fourteenth Amendments.

Plaintiffs charge that the questioned exclusions effect arbitrary and unreasonable discriminations, denying due process and equal protection; that they accomplish "an invidious discrimination between classes of laborers on racial grounds" (the agricultural labor force, their brief elaborates, having become "overwhelmingly black and chicano"), contrary to the Fifth and Fourteenth Amendments; that the overall impact of the "systematic exclusion" they suffer creates "a system of employment so blatantly violative of fundamental rights as to render the continuation of the current operation of the migrant agricultural labor system imposed peonage in violation of the Fifth, Thirteenth and Fourteenth Amendments * * *." (Complaint par. 36.) They seek the convening of a three-judge court to "hear and determine" their charges of unconstitutionality, to grant a declaratory judgment, and, finally, under their eighth prayer, to "grant appropriate equitable relief in the nature of injunction or mandamus enforcing plaintiffs' rights and defendants' responsibilties under the First, Fifth, Thirteenth and Fourteenth Amendments * * *."[1]

As to the immediate question of a three-judge court, defendants make a powerful argument that plaintiffs have failed to plead for such relief as to require that cumbersome and expensive kind of tribunal. See *Utica Mutual Insurance Co.* v. *Vincent*, 375 F.2d 129, 131 (2d Cir.) cert. denied, 389 U.S. 839 (1967). With respect to both the state and federal statutes called into question, three judges must convene only if the relief sought is "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution" of the enactment.[2] For the grant-

[1] The ninth and last prayer is for the usual "other and further relief * * *."

[2] 28 U.S.C. §§2281, 2282.

ing or denial of merely declaratory relief, a single district judge is sufficient. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 152-155 (1963); and see *Mitchell* v. *Donovan,* 398 U.S. 427, 430-431 (1970). Except for the vague penultimate prayer for "appropriate equitable relief in the nature of injunction or mandamus," plaintiffs nowhere indicate what, if anything, they actually want "restrained." Their difficulty is evident, of course. Suffering from deprivations rather than impositions, their injuries are from benefits withheld rather than positive penalties or affronts. They do not seek the cessation of anything, except in the roundabout sense of some double negatives. They complain of injuries correctible ultimately by legislative enlargements, not by prohibitions against the enforcement of existing law. This characterization of plaintiffs' complaint does not serve, and is not meant, to minimize their plight or their grievances. Nor is it offered in entire ignorance of our law's general tendency to restrict old notions about "negative" and "affirmative" actions by government. See *Rochester Telephone Corp.* v. *United States,* 307 U.S. 125, 143 (1939). The technical point remains something of consequence, however, when we deal with a provision for three-judge courts, which is not "a measure of broad social policy to be construed with great liberality, but * * * an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States,* 312 U.S. 246, 251 (1941). And this is especially so when, as now, the Government, State or Federal, for the protection of which the three-judge device exists, comes before us through its responsible officers and pleads to be spared the protection.

Although this position of the defendants is a substantial one, strengthened perhaps by specific reference to some

of the varying statutes plaintiffs join as objects of this action,[3] the court will assume that the prayer for relief, if that were the sole concern, would be sufficient to call for a three-judge court.

This leaves, however, the contention that plaintiffs' case is foreclosed by controlling precedent, and that the single judge should therefore dismiss the complaint for that reason. *Ex parte Poresky,* 290 U.S. 30 (1933); *Utica Mutual Insurance Co.* v. *Vincent, supra,* 375 F.2d at 130. The court has concluded that the defendants must prevail on this ground.

However it might be viewed as a legislative proposition, and however it might fare were it a new question for the courts, plaintiffs' complaint is defeated by the decision just a year ago in *Romero* v. *Hodgson,* 403 U.S. 901, summarily affirming 319 F.Supp. 1201 (N.D. Calif. 1970).[4] While the decision thus sustained was rendered by a divided three-judge court, and while one Justice noted his dissent from the affirmance, it seems clear that the Supreme Court's ruling concludes the merits of the case plaintiffs have brought here.[5] Plaintiffs urge several distinctions, but they are

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[3] Insofar as plaintiffs might be thought to be seeking injunctions against federal tax collections or assessments, they would face the broad prohibition against such relief in 26 U.S.C. §7421(a). The point, not in itself a major one, suggests some of the multifarious difficulties likely to arise in a lawsuit that challenges so wide an array of enactments. The decision reached today makes it unnecessary to pursue such problems.

[4] Plaintiffs rely upon *Local Union No. 300* v. *McCulloch,* 428 F.2d 396 (5th Cir. 1970), holding the validity of the National Labor Relations Act exclusion of farm workers a question substantial enough for three judges. But *Romero,* decided by the Supreme Court a year later, made that decision obsolete.

[5] That the decision is to be viewed as being "on the merits," see, e.g., *United States ex rel. Epton* v. *Nenna,* 446 F.2d 363, 366 (2d Cir.), cert. denied, 404 U.S. 948 (1971).

not, singly or together, persuasive. The *Romero* case, plaintiffs point out, concerned only unemployment compensation, while the pervasive disadvantages shown by the statutes now attacked present a more vivid, dramatic and profound case of disadvantage for agricultural workers. This would mean, for example, that *Romero* itself should be overruled when the same tax scheme is tied for litigation purposes to other measures, enacted at other times and serving other ends. The argument is novel and interesting. But the court perceives in it no sound basis for reconsidering at this level a recent decision of the Supreme Court following the thus far settled course of judging statutes singly, with an eye to their distinct rationales and asserted justifications, for purposes of constitutional tests.

Plaintiffs also argue that *Romero* did not deal with the argument, now made, that the agricultural exclusion effects a forbidden constriction of the right to travel. Apart from the fact that the new argument does not appear to be a powerful one, the tendering of such additional points does not warrant reexamination by a district court of a precedent that is squarely controlling in terms of its result.

Plaintiffs are on still weaker ground when they urge that *Romero* overlooked a point now stressed—that agricultural workers are today "overwhelmingly black and chicano," so that the exclusions in question impose "substantial disabilities upon plaintiffs along discrete and identifiable racial lines." Actually, the plaintiffs in *Romero* argued repeatedly to the Supreme Court that the exclusion "discriminates, albeit inadvertently, against Mexican-Americans who constitute the major California ethnic group employed in agriculture and minority groups who constitute the major ethnic and racial groups employed in agri-

culture throughout the United States."[6] There is, then, no valid occasion for this court to consider whether such "inadvertent" impacts, where it seems plain that the underlying legislative "judgments are rational, and not invidious," and are grounded in views "lacking in racial motivation," *Jefferson* v. *Hackney*, —— U.S. ——, —— (1972), could require a a result different from that in *Romero*. Cf. *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961).

The court is persuaded, in sum, that plaintiffs' federal claims are in the pertinent sense unsubstantial. The motion for a three-judge court is denied. The complaint is dismissed.[7]

It is so ordered.

Dated: New York, New York
June 7, 1972

(Illegible)
U.S.D.J.

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[6] Jurisdictional Statement, O.T. 1970, Misc. No. 6847, p. 8; see also *id.* at 11.

[7] As the sole ground he briefs for dismissal, the State Attorney General argues that a suit may not proceed on behalf of unidentified—i.e., fictitiously named—plaintiffs, citing *Roe* v. *State of New York*, 49 F.R.D. 279 (S.D.N.Y. 1970). The argument, in which the federal defendants join, has weight, but it is not reached as a ground of decision herein. At the court's suggestion, plaintiffs' counsel has filed a sealed statement identifying the plaintiffs. If and when the question should become a live one, the court can consider a direction that the identities be disclosed or, if that is resisted, dismissal be confronted again as an arguable alternative. The problem will arise, of course, only if and when the ruling now announced is reversed. Balancing the interests, including the plausible fear of plaintiffs that they risk reprisals, the postponement thus effected seems a fair and sufficient expedient.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the seventeenth day of May one thousand nine hundred and seventy-three.

Present:

HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
HON. WALTER R. MANSFIELD,
Circuit Judges.

Docket No. 72-1744

JANE DOE, JOHN DOE, RICHARD ROE, JAMES POE, JAMES DOE, JAMES ROE, JOHN ROE, RICHARD DOE, JANE ROE, in immigrant agricultural workers, on behalf of each and on behalf of all others similarly situated, namely those persons engaged in migrant agricultural labor in Ulster County, New York, *Plaintiffs-Appellants,*

v.

JAMES D. HODGSON, Secretary of Labor, JOHN E. WALTERS, Commissioner of Internal Revenue, LOUIS LEVINE, Industrial Commissioner of the State of New York, EDWARD B. MILLER, Chairman, National Labor Relations Board, HORACE MENASCO, Administrator, Wage and Hour Division, United States Department of Labor, GEORGE OSTROW, Director, Division of Labor Standards, New York State Department of Labor, ROBERT M. BALL, Commissioner of Social Security, SOLOMON SENIOR, Chairman, New York State Workmen's Compensation Board, *Defendants-Appellees.*

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk